

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

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| In the Matter of the Application of Dora Salinas |) | Case No. 3-SE-95-503 |
| for Water Quality Certification to Place |) | |
| Fill in a Wetland in the Town of Jackson, |) | |
| Washington County, Wisconsin |) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on June 11, 1996, at West Bend, Wisconsin, Jeffrey D. Boldt, administrative law judge presiding. In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Michael J. Cain, Attorney
P O Box 7921
Madison, Wisconsin 53707-7921

Dora E. Salinas
1736 Margaret Court
Jackson, Wisconsin 53037-9709

John and Faith Schulenberg
1682 Sherman Road
Jackson, Wisconsin 53037

FINDINGS OF FACT

1. Dora Salinas, 1736 Margaret Court, Jackson, Wisconsin, 53037, applied to the Department of Natural Resources (the Department or DNR) for water quality certification pursuant to Section 401, Federal Clean Water Act, and Chapter NR 103 and NR 299, Wis. Admin. Code.

2. Certification was requested to place fill in a wetland for construction of a residence. The proposed project is located in the SW 1/4 of the SW 1/4 of Section 22, Township 10 North, Range 20 East, Town of Jackson, Washington County, Wisconsin. The applicant is the owner of said parcel. The proposed project would involve filling of two acres of wetlands.

3. On June 27, 1995, the Department denied the water quality certification of Ms. Salinas. The Department determined that the proposed activity was not wetland dependent and that practical alternatives exist which will not adversely impact wetlands nor result in other significant adverse environmental consequences. On July 25, 1995, the Department received a request for hearing from Ms. Salinas.

4 On August 17, 1995, Department Secretary George E. Meyer granted Ms. Salinas a contested case hearing with respect to the water quality certification denial

5 Ms Salinas owns 37 1/2 acres in the vicinity of the proposed fill area. Her intention is to build a 3,000 square foot home on a two acre lot in an area which is clearly wetlands within the meaning of Wisconsin law. She notes that there are drain pipes draining large new subdivisions on her property and that the area has become increasingly wet in recent years. She admits that her property includes some fifteen acres of wetlands. She believes that the area she intends to fill is artificially created wetland if it is wetland at all. Ms. Salinas concedes that there are other upland areas of her property which would support buildable lots. However, her daughter also intends to construct a home on a four acre lot in the NW portion of the Salinas parcel.

6 The proposed fill area is located near an existing farmhouse owned by the Schulenbergs. The Schulenbergs testified that the area near their property is saturated with water and that they frequently experience problems with water in their basement. The problems with water in their basement are in part due to a high water table in the area. These problems are worse during periods of heavy rain.

7 There is no question that the subject parcel is wetlands within the meaning of Wisconsin law. The area has hydric soils. The area supports hydrophytic vegetation. The area is identified on the Wisconsin wetlands inventory map (Exhibit 9). The vegetation in the area includes red osier dogwood, reed canary grass, sandbar willow, aster simplex, cattails and other vegetation consistent with wetlands. The soils in the area are silty loams and peats consistent with hydric wetland soils.

8 The area water management specialist Kathi Kramasz conducted a site inspection and made a determination of the various functional values of the wetland complex. The fifteen acre tract on the Salinas property is part of an overall wetland 160 acres in size which drains some 800 acres in the wetland water shed. The wetland complex has very high significance for flood and stormwater attenuation, water quality protection and wildlife habitat. The wetland complex had a medium significance, in the rating of Ms. Kramasz, for floral diversity and groundwater protection. Ms. Kramasz provided unrebutted expert testimony that the proposed fill would have a detrimental impact on these important functional values of the wetlands. Further, Ms. Kramasz opined that the proposed fill would likely have some detrimental impact on neighboring properties including the Schulenbergs.

9 The project proponent has not carried her burden of proving that the proposed fill would not have a detrimental impact on the functional values of the affected wetlands.

10 The construction of single family dwelling is not a wetland dependent activity, because it does not require location in or adjacent to wetlands to fulfill its basic purpose within the meaning of sec. NR 107(2), Wis. Admin. Code.

11 The project proponent has also not demonstrated that there are no reasonable alternatives to the project as proposed. There are clearly upland areas in the vicinity of the proposed fill area. There are also upland areas which may include a buildable lot just south of the proposed fill. There is a significant portion of land in the vicinity of the NW 1/4 of the Salinas property in which Ms. Salinas' daughter intends to construct her home. There is ample room for two 3,000 square foot houses on the 4 1/4 acre parcel on the NW corner of the Salinas parcel.

12. The subject property is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats. and NR 299.05(6), Wis. Admin. Code.

2. The proposed fill for construction of a single family dwelling is not a wetland dependent activity within the meaning of sec. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code, because construction of a home is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. There are practical alternatives to the fill proposal which will not adversely impact wetlands and will not result in other significant environmental consequences. Section NR 103.08(4)(a)(2), Wis. Admin. Code. Practical alternatives means available and capable of being implemented taking into consideration costs, available technology and logistics in light of overall project purposes. NR 103.07(1), Wis. Admin. Code. Taking the above factors into consideration the applicant has not shown why she could not construct a home on another upland portion of her parcel.

4. The project does not meet the requirements of NR 103, Wis. Admin. Code because *the project is not wetland dependent and because there are practical alternatives which will not adversely impact wetlands and which will not result in significant adverse environmental consequences.*

5. The proposed project could result in violations of the standards contained in NR 103.08(3)(b)(2)(f), Wis. Admin. Code. Specifically, those projects would have detrimental impacts on wetlands.

6. The subject property is not located within an area of special natural resource interests within the meaning of NR 103.04, Wis. Admin. Code.

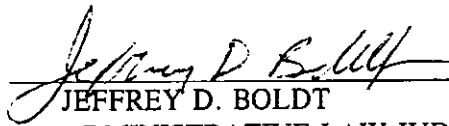
ORDER

IT IS HEREBY ORDERED that the water quality certification application described above be DENIED because there are other available alternatives which would not involve a detrimental impact to wetlands.

Dated at Madison, Wisconsin on June 27, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By


JEFFREY D. BOLDT

ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.